RECORD NO. 15-10006-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner/Cross-Respondent,

V.

GAYLORD CHEMICAL COMPANY, LLC,

Respondent/Cross-Petitioner.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD
REGION 10
CASE NO. 10-CA-38782

BRIEF OF RESPONDENT/CROSS-PETITIONER GAYLORD CHEMICAL COMPANY, LLC

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I. CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Respondent/Cross-Petitioner Gaylord Chemical Company, LLC, certifies that the following listed parties have an interest in the outcome of this case:

1. Agee, Lynn – Counsel for Charging Party
2. Armstrong, Aileen A. – Counsel for Petitioner/Cross-Respondent
3. Connor, Glen M. – Counsel for Charging Party
4. Dreeben, Linda – Counsel for Petitioner/Cross-Respondent
5. Gaylord Chemical Company, LLC –Respondent/Cross-Petitioner
6. Harrell, Jr., Claude T. – Petitioner/Cross-Respondent
7. Heaney, Elizabeth – Counsel for Petitioner/Cross-Respondent
8. Jackson Lewis P.C. – Counsel for Respondent/Cross-Petitioner
9. Lancia, Nicole – Counsel for Petitioner/Cross-Respondent
10. National Labor Relations Board – Petitioner/Cross-Respondent
11. Quinn, Conner, Weaver, Davis & Rouco –Counsel for Charging Party
12. Sandron, Ira – Administrative Law Judge
13. Schwartz, Jeffrey A. – Counsel for Respondent/Cross-Petitioner

14. United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, AFL-CIO-CLC and its Local 887 – Charging Party

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), and Fed. R. App. P. 26.1, Respondent/Cross-Petitioner Gaylord Chemical Company, LLC identifies the following subsidiaries, conglomerates, affiliates and parent corporations:

1. None.

II. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary in this case because of the significance of the National Labor Relations Board's ruling. The National Labor Relations Board has overreached in requiring Gaylord Chemical Company, LLC to recognize a union that had no prior connection to Gaylord or its workforce. This is an issue of importance for all employers who move to a new location.

III. STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f). Respondent transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by maintaining a facility in Tuscaloosa, Alabama.

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The Board's decision is not consistent with applicable law.

VII. STATEMENT OF THE CASE

A. Procedural Background

This case emanates from an unfair labor practice charge that the National Labor Relations Board ("NLRB" or "Board") processed against Gaylord Chemical Company, LLC ("Gaylord"). A hearing was held in Tuscaloosa, Alabama before an Department of Labor Administrative Law Judge ("ALJ") which found that Gaylord had violated Sections 8(a)(1) and (5) of the National Labor Relations Act by among other things failing to recognize United Steel Workers Local Union 9 ("Union" or "USW Local 9" or "District 9" or "Local 9") for purposes of representing its employees. On August 18, 2011, the ALJ issued a decision finding in favor of the NRLB's General Counsel and concluding that Gaylord violated the NLRA. On October 17, 2011, Gaylord filed Exceptions with the NLRB to the Administrative Law Judge's decision. On June 25, 2012, the NLRB affirmed the ALJ's decision. On October 22, 2012, the NLRB filed its Application for Enforcement of an Order of the National Labor Relations Board. On November 5, 2012, Gaylord filed a Cross-Petition for Review of the same Decision and Order. On June 26, 2014, the United States Supreme Court ruled in *National Labor Relations Board v. Noel Canning, et al.* (134 S. Ct. 2550; 189 L. Ed.2d 538) that

the NLRB lacked a legally sufficient quorum for almost all of 2012, which had the practical effect of invalidating all NLRB decisions rendered during that timeframe, including the case at bar. Consequently, the NLRB moved to withdraw its petition for enforcement with this Court on July 1, 2014. On August 13, 2014, the Court issued its order dismissing the appeal.

On October 28, 2014, the NLRB issued a new Decision and Order (361 NLRB No. 67) which replicated the prior one overruling Gaylord's exceptions and affirming the ALJ's decision that Gaylord had a legal duty to recognize and bargain with the Union. On January 2, 2015, the NLRB filed its Application for Enforcement of an Order of the National Labor Relations Board, and on January 14, 2015, Gaylord filed its Cross-Petition for Review.

B. Factual Background

Gaylord is a Louisiana Limited Liability Corporation and is engaged in the production of Dimethyl sulfoxide ("DMSO") at its Tuscaloosa, Alabama manufacturing site. Gaylord's corporate headquarters are located in Slidell, Louisiana. The parties do not contest the salient facts in this dispute. The Administrative Law Judge had to determine whether under the record evidence Gaylord enjoyed the right at its new facility in Tuscaloosa to decline to recognize a local union that did not previously represent its employees.

Prior to commencing operations in Tuscaloosa, Gaylord operated in

Bogalusa, Louisiana where it manufactured DMSO and Dimethyl sulfide ("DMS"). Gaylord does not manufacture DMS at its Tuscaloosa plant. Gaylord's current operations involves some of the same equipment it used in Bogalusa but it built the new plant from scratch and it contains new piping; an essential element of the manufacturing process. For years, certain employees working in Bogalusa were represented for purposes of collective bargaining, first by the paperworkers and later by the steelworkers. In Bogalusa, the certified bargaining representative was set forth as "The United Steel Workers International and its Local No. 13-0189" ("Local 189"). At no time have the employees informed Gaylord of any desire to be represented by United Steel Workers District 9. In that regard, Gaylord has only received requests for bargaining or for information from District 9.

VIII. SUMMARY OF THE ARGUMENT

Gaylord maintains that is not under a legal obligation to recognize United Steel Workers Local 9 as its employees' collective bargaining representative. Gaylord contends that its employees were represented by a different union while working at its Bogalusa plant and that its contract with the Union narrowly defined that relationship as being between that Union and Gaylord for the work being performed in Bogalusa. It is Gaylord's position that if USW Local 9 wants to represent Gaylord's employees for the purpose of collective bargaining, it should file a petition with the NLRB establishing that the employees want Local 9 to be their collective bargaining representative.

IX. ARGUMENT

A. Introduction.

The NLRB concluded Gaylord's refusal to recognize and bargain with the Union was a violation of Section 8(a)(5) and (1) the National Labor Relations Act ("NLRA" or "Act"). In adopting the ALJ's decision the Board also found Gaylord unlawfully interrogated employees, created a position without first bargaining with the Union, and refused to respond to the Union's information requests. Gaylord maintains the record does not support the Board's Decision and Order. Gaylord does not have a duty to bargain with the Union, and, as such, was not obligated to respond to the Union's request for information or to bargain over a new position. Gaylord also denies it unlawfully interrogated employees.

B. Standard of Review.

The Court should accept the NLRB's findings with respect to questions of fact if they are supported by substantial evidence on the record considered as a whole. See 29 U.S.C. §160(e). "Substantial evidence is more than a mere scintilla. It means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 745 (5th Cir. 1979) (citations omitted) (internal quotation marks omitted). This Court has held it not "obliged to stand aside and rubber-stamp [our] affirmance of administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the

congressional policy underlying a statute." *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1261 (11th Cir. 1999) (alterations in original) (internal quotations and citations omitted). "Substantial evidence is more than a mere scintilla of evidence. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 984 (11th Cir. 1989)). "[T]he Board cannot ignore the relevant evidence that detracts from its findings." *Northport Health Svcs., Inc. v. NLRB*, 961 F.2d 1547, 1550 (11th Cir. 1992). "When [it] misconstrues or fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence." *Id.*

C. Gaylord Did Not Violate Section 8(a)(1) and (5) of the National Labor Relations Act Because There is No Evidence Establishing a Continuing Bargaining Relationship With District 9.

Mike Tourné, a longtime Union representative of the employees while they worked at the Bogalusa facility, testified succinctly that each contract Gaylord entered into with the Union was a "three-party agreement." Tr. at 170. [1] Tourné confirmed that Local 189 was present at the bargaining table for every negotiation, and was a necessary signatory to every contract. *Id.* and (Tr. at 144.) The ALJ completely ignored this evidence concluding that USW International, standing

[1] "Tr" refers to the transcript of the proceeding before the Administrative Law Judge.

alone, is the certified bargaining representative. (D. 6:35).[2] This conclusion is at odds with the evidence.

As noted above, all of the various contracts the General Counsel entered into evidence (J. Exs. 1, 2, 3 and 12)[3] revealed the certified bargaining representative was the different iterations of the international entity "and its Local 189." This use of the conjunctive phrasing is significant because it identifies the specific local that is the certified representative. According to USW representative Dan Flippo, this phraseology is not what the union typically uses in its contracts. Mr. Flippo indicated it was used in "older contracts." The more common way the union identifies its certified bargaining representative is to phrase it to identify the international on behalf of its local. (Tr. at 88.) Further, there is no question that the local is its own entity. "The local Union has its own attorney. They have their own officers, their own finances all of that...." (Tr. at 83.) Again, the Board failed to acknowledge Flippo's testimony confirming that this relationship was not like others the USW typically constructs.

While the Board and the ALJ adopted the Union and General Counsel's positions that Gaylord had a legal obligation to recognize the Union in response to District 9's requests for recognition and bargaining because Gaylord hired more than 50% of the employees, the ALJ and the Board ignored the Union's own

[2] "D" refers to the ALJ's Decision.
[3] "J Ex." refers to the joint exhibits entered into the record at the hearing before the ALJ.

actions which belie that position. First, Tourné's email to Flippo advising him of Gaylord's move to Tuscaloosa concludes with Tourné's statement that the employees desire union representation. (G.C. Ex. 14.)[4] Further, the Union sought new authorization cards from employees after the Tuscaloosa relocation. (Tr. at 65.) If, as the Union and the General Counsel contended and the ALJ and Board found, Gaylord was obligated to recognize and bargain with the Union post-relocation, then why seek new authorization cards? Nothing precluded the Union then or now from filing a representation petition with the Labor Board in order to seek certification for a new local.

Instead, the ALJ and the Board permitted the Union to manufacture a new certified bargaining representative at a new facility with a workforce that currently has no collective bargaining agreement or relationship with District 9. (Tr. at 102.) In this regard, there is no dispute that Gaylord and Local 189 negotiated the effects of the Bogalusa shutdown that resulted in severance payments for all affected employees. (Tr. at 61 and G.C. Ex. 21.)

While the Union attempted to impute an anti-union bias to Gaylord, it does not appear that was a factor in the ALJ or Board's Decisions. Nevertheless, in its Decision and Order the Board ignored the absence of evidence of bias. This is important because 1) it illustrates Gaylord is merely conforming with its belief the

[4] "G.C." refers to the General Counsel and exhibits it entered into evidence before the ALJ.

Union did not travel with it to Tuscaloosa; and 2) the alleged unlawful interrogations were not tinged with any anti-union animus. Indeed, as employee Ronald Talley confirmed, Gaylord was under no obligation to hire any of the employees who had worked at the Bogalusa facility. (Tr. 61.) Yet, there is no dispute that Gaylord brought on board nearly all of the employees it had severed from Bogalusa. (J. Ex. 28.) Further, there is no dispute that Gaylord's reason for relocating had nothing to do with the Union. (Tr. at 58.)

Thus, it is with this backdrop that the legal issue be framed. That is, is an employer who relocates its facility approximately 238 miles[5] obligated to recognize and bargain with a local that was not a signatory to the contract that existed prior to the plant's closing? The Board did not cite to any Board or court opinion on facts like those here that support its Decision and Order. Gaylord submits there are no Board or Court decisions that contain the same salient facts that exist here: 1) the conjunctive definition of the certified bargaining representative as being both the international and the designated local (189); 2) the significant distance of the move; 3) the admitted absence of anti-union bias behind Gaylord's decision to relocate; 4) the union's internal requirement that employees continue to express a desire for unionization; 5) the geographic definition in the collective bargaining agreement (Bogalusa); and 6) the solicitation of authorization cards post-

[5] This mileage is derived from point to point from Bogalusa to Tuscaloosa on Google maps.

relocation.

In effect, the Board's order in the instant case improperly sanctions the United Steelworkers International's transfer of jurisdiction from District 13 to District 9 without any evidence establishing that a majority of affected employees ratified such a transfer. Moreover, to the extent the collective bargaining agreement survived the relocation of operations from Bogalusa to Tuscaloosa, the Board's order wrongfully amounted to an amendment to the Union's certification. The Board erred by failing to recognize that a question concerning representation existed after the relocation and that the Union never took any affirmative steps to resolve that question. As a result, contrary to the Board's erroneous conclusions, Gaylord lawfully refused to recognize District 9.

In *Hermet, Inc.*, 222 NLRB 29, 37-39 (1976), a majority of unit employees signed a letter to their international union advising that they wanted Local 445 to continue serving as their bargaining representative, not a sister local (Local 545). *Id.* at 37. However, two days after submitting this letter, Local 545 told employees that they would have to transfer membership to Local 545. Subsequently, the employer entered into an agreement with Local 545 recognizing it as the employees' exclusive bargaining representative and "required membership therein as a condition of employment, notwithstanding the employees' preference for [Local 445] as manifested by their letter to the International before [the

employer and Local 545] announced to the employees that a purported transfer of bargaining rights was to take place." *Id.*

The Board affirmed an administrative law judge's decision which held that the employer violated Sections 8(a)(1), (2), and (3), and Local 545 violated Sections 8(b)(1)(A) and (2) by entering into the aforementioned agreement. *Id.* The administrative law judge, whose decision was adopted by the Board, noted "an employer, ordinarily, may not rely upon actions of an International union resulting in a jurisdictional realignment as between affiliated locals and may violate the Act by withdrawing recognition from one local and recognizing another in accordance with such a reorganization." *Id.* at 37 (internal citations omitted). The administrative law judge then explained "[o]n the basis of this principle, the Board has refused to amend the certification of one local by substituting the name of a sister local, in accordance with an agreement by both locals and their parent international to transfer bargaining rights, where the employees' approval was not sought until after the decision to transfer jurisdiction over them had already been made." *Id.* quoting *Carriage Oldsmobile Cadillac, Inc.,* 210 NLRB 620 (1974). Next, the administrative law judge cited to *Yale Manufacturing Company, Inc.*, 157 NLRB 597 (1966) where "[t]he Board reached a similar result where the employer's employees had not been given an opportunity to vote at a meeting where the old local's members voted to transfer, to a newly charted sister local,

bargaining rights in the area where the employer's plant was located." *Id.* Based upon this clear precedent, the administrative law judge in *Hermet* found the employer's and union's conduct to be unlawful. *Id.* at 38.

Further, in *The Gas Service Company*, 213 NLRB 932 (1974), two local unions filed a joint petition seeking to amend the certification by substituting one local for another, notwithstanding the employer's objection. The Board denied the union's motion to amend the certification on the grounds that employees could not be assured of the continuity of their selected bargaining representative due to the fact that there would be a new labor organization with new officers responsible for representing them. As a result, the Board concluded such a maneuver raised a question concerning representation, which needed to be resolved through the Board's representation procedures. *Id.* at 933. See also *Gulf Oil Corporation*, 135 NLRB 184 (1962) and *Independent Drug Store Owners of Santa Clara County*, 211 NLRB 701 (1974), enf'd. 528 F.2d 1225 (9th Cir. 1975). Cf. *United States Gypsum Co.*, 164 NLRB 931 (1967) (Board granted motion to amend certification where jointly certified local and international union attempted to substitute another local following a merger of the two locals after members voted to ratify the merger).

In addition, the Board's Office of the General Counsel's Division of Advice has relied upon this precedent to conclude that employers did not violate Section

8(a)(5) by failing to recognize local unions under similar circumstances presented in this case. In *Crescent Bay Convalescent Hospital*, 31-CA-25999 (Division of Advice Feb. 26, 2003), the Division of Advice noted: "[t]his case raises the question of whether, after an international union transfers jurisdiction rom one local to another, the employer has a duty to recognize the second local as the successor to the representational rights of the first union absent proof of majority support." *Id.* at 3 (noting that the Division of Advice considered the same issue in *Centra, Inc.*, 8-CA-27654 (Division of Advice, Jan. 22, 1996), discussed *infra*, but did not need to decide the issue because of a pending representation petition). Following the precedent described above, the Division of Advice concluded "that an employer cannot be compelled to recognize a union after a transfer of jurisdiction absent proof of majority support for the new union." *Id.* at 5. Because the new union "failed to provide such proof, the [employer] here had no duty to recognize it."

Earlier, in *Centra, Inc.*, the Division of Advice explained:

> [t]his case raises the novel question of whether, after an international union has a made a decision to transfer jurisdiction from one local to another, the second local succeeds to the representational rights of the first local. Local 407 is different from and not merely a continuation of Local 964. Thus, the case is arguably distinguishable from those cases involving union affiliations and/or mergers, where the arguably 'new' union is merely a continuation of and therefore a successor to the predecessor union if there is 'continuity of identity.' Because of the pending R petitions, we do not have to decide the novel question of whether there is merit to any claim that, under Section 8(a)(5), the

> Employer must recognize and bargain with Local 407 in the circumstances set forth above.
>
> Instead, the Board can clearly determine the representational wishes of unit employees. The best method of ascertaining employees' wishes in this case is to process the pending petitions…[and we thus] conclude that the appropriate way to handle the dispute in this case is to dismiss the Section 8(a)(5) charge, absent withdrawal, and to process the pending election petitions.
>
> *Id.* at 2.

The Board precedent and Division of Advice opinions described in detail above apply with equal force to the present case. It is undisputed that in Bogalusa, the certified bargaining representative was "The United Steel Workers International and its Local No. 13-0189." After Gaylord relocated the plant to Tuscaloosa, Gaylord received requests for bargaining only from District 9. However, Gaylord was under no obligation to recognize District 9 absent evidence that a majority of affected employees desired to designate District 9 as their exclusive bargaining representative. No authorization cards were ever submitted to Gaylord, and neither the International nor District 9 ever filed an election petition with the Board. Accordingly, the Board erred by finding Gaylord violated Section 8(a)(5) of the Act by failing to recognize District 9. In fact, the Board's order is clearly erroneous because, absent the requisite majority support, had Gaylord recognized District 9, Gaylord would arguably have violated Sections 8(a)(1),(2), and (3) of the Act and District 9 would have violated Sections 8(b)(1)(A) and (2).

Moreover, it is immaterial that the International Union may have been listed in the collective bargaining agreement as one of the certified bargaining representatives of the affected employees. In *Harte & Co.*, 278 NLRB 947, 948 (1986), the Board held that "an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage - approximately 40% or more - of the new plant employee complement." *Id.* at 948 (citing *Westwood Import Company*, 251 NLRB 1213, 1214 (1980)). As noted, in Bogalusa, the certified bargaining representative was "The United Steel Workers International and its Local No. 13-0189." Therefore, because of the conjunctive description of certified bargaining representatives, even presuming *arguendo* the collective bargaining agreement survived Gaylord's relocation of operations to Tuscaloosa, the Union's attempt to substitute District 9 amounts to nothing more than a disguised request to amend the certification. However, as explained *supra*, absent evidence of employee approval, such an amendment may not be effectuated. Rather, a question concerning representation existed (and still exists) and until that issue is resolved in District 9's favor, Gaylord does not and cannot have a bargaining obligation. Therefore, the Board's findings are erroneous. Accordingly, this Court should grant Gaylord's Cross-Petition for Review and deny the Board's request to enforce its order.

X. CONCLUSION

Based upon the foregoing, Gaylord requests that the Court vacate the NLRB's Decision and Order in all respects.

Respectfully submitted this 27th day of April, 2015.

Respectfully submitted,

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XI. CERTIFICATE OF COMPLIANCE

I certify that the foregoing **BRIEF OF RESPONDENT/CROSS-PETITIONER GAYLORD CHEMICAL COMPANY, LLC** complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that the foregoing **BRIEF OF RESPONDENT/CROSS-PETITIONER GAYLORD CHEMICAL COMPANY, LLC** complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated this 27th day of April, 2015.

By:_____

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XII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **BRIEF OF RESPONDENT/CROSS-PETITIONER GAYLORD CHEMICAL COMPANY, LLC** has been served this date via U.S. mail upon the following:

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Dated this 27th day of April, 2015.

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